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COMMENTS

SOVEREIGN IMMUNITY FOR TORT ACTIONS IN OKLAHOMA: THE GOVERNMENTAL TORT CLAIMS ACT

I. INTRODUCTION

This Comment will attempt to define the status of sovereign immunity in Oklahoma as it pertains to the state and its political subdivisions. To facilitate this discussion, a brief review of the doctrine's history will be presented first.¹ The primary focus will be on the new Oklahoma Governmental Tort Claims Act.² The Act was passed by the Oklahoma legislature in response to the Oklahoma Supreme Court's decision in *Vanderpool v. State*.³ In *Vanderpool*, the court overturned the judicially created sovereign immunity laws of the state.⁴ It is hoped that this Comment will inform the reader of the operation and potential impact of the new Act. It is this writer's position that due to the extensive limitations and exemptions to liability contained in the Act, for all practical purposes, sovereign immunity is alive and well in Oklahoma.

II. BACKGROUND

A. *English History*

America's sovereign immunity laws have ancestral roots in English common law.⁵ Under the feudal system of government established in England during the middle ages, a lord could not be sued in his own

1. See *infra* notes 2-67 and accompanying text.

2. The Governmental Tort Claims Act, OKLA. STAT. tit. 51, §§ 151-171 (Supp. 1984) (hereinafter referred to as the Act) (effective October 1, 1985; amending the Political Subdivision Tort Claims Act, OKLA. STAT. tit. 51, §§ 151-170 (1981)).

3. *Vanderpool v. State*, 672 P.2d 1153 (Okla. 1983).

4. See *infra* notes 94-101 and accompanying text.

5. See Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 2 (1924). See also Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963); Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476 (1953); Barry, *The King Can Do No Wrong*, 11 VA. L. REV. 349 (1925).

court, but he could be sued in the court of a superior lord.⁶ Since there were no superior courts to that of the king, the legal maxim—"the King can do no wrong"—came into being.⁷ Although there is some question as to the exact meaning of this maxim,⁸ it appears that the immunity enjoyed by the king was personal and based on the idea that no court in England could obtain jurisdiction over the king, unless he consented to the action.⁹

However, even this immunity to jurisdiction was not absolute, because several remedies were available to the king's subjects for wrongs committed against them by the king.¹⁰ As the king's power increased in England, the personal immunity enjoyed by him was slowly transferred to the symbol of the crown and eventually to the government.¹¹ By the time of the American Revolution, the concept of sovereign immunity was well established in English common law, though the rationale for the concept was rooted in the middle ages.¹²

B. *Early American History*

It seems illogical that our founding fathers would have wished to carry over into American common law the medieval concept of sovereign immunity, with the associated implications of a government which can not be held responsible for its actions.¹³ Although the Constitution does not specifically address the question of governmental immunity for tortious conduct, Article III, Section 2, in addressing the scope of the federal court system, does state that the "judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State." This implies that the founding fathers contemplated occasions when a citizen would bring suit directly against state governments.¹⁴ For example, in

6. Spector, *State Sovereign Immunity in Tort: Oklahoma's Long And Tortuous Road*, 34 OKLA. L. REV. 526, 526 (1981). See also Pugh, *supra* note 5, at 478.

7. Borchard, *supra* note 5, at 2.

8. *Id.* at 2 n.2 (true meaning of maxim was that the king was not privileged to do wrong). See *id.* at 4 (quoting Blackstone that the king was incapable of thinking or doing any wrong). See also Pugh, *supra* note 5, at 479; Jaffe, *supra* note 5, at 3-4.

9. Borchard, *supra* note 5, at 4; see Pugh, *supra* note 5, at 478.

10. See Borchard, *supra* note 5, at 5; Pugh, *supra* note 5, at 479-80; Jaffe, *supra* note 5, at 1-3, 18-19.

11. Pugh, *supra* note 5, at 478-79 & n.11 (with the downfall of feudalism, restraints on the powers of the king vanished; in essence the king became the state).

12. See *id.* at 480-81. See also Borchard, *supra* note 5, at 2; Spector, *supra* note 6, at 527-28.

13. Pugh, *supra* note 5, at 480-81; Spector, *supra* note 6, at 527.

14. See Pugh, *supra* note 5, at 481. But see *id.* at 481-83 (arguments by Hamilton, Madison, and Marshall that Constitution did not give citizens right to sue state).

the early Supreme Court decision in *Chisholm v. Georgia*,¹⁵ the Court held that a state was subject to an action in assumpsit, brought by a citizen of another state.¹⁶

The *Chisholm* decision renewed the concerns state leaders had expressed during the constitutional debates, that a state could be subject to a suit brought by a citizen of another state and that a subsequent judgment could be obtained against the state's treasury.¹⁷ Judgments against state treasuries were of special concern to early legislators because of the size of the state debts that had accumulated during the Revolutionary War.¹⁸ Legislators feared that permitting a state to be sued by a private citizen would result in a flood of suits brought against the various states by creditors who wished to collect on outstanding war debts, thereby draining funds from the state treasuries.¹⁹

Wishing to avoid either higher taxes or complete bankruptcy of state treasuries and responding in part to *Chisholm*, the Eleventh Amendment to the Constitution was proposed and ratified.²⁰ The Eleventh Amendment removed the power of the federal courts to hear claims brought against a state by a citizen of another state.²¹

After the doctrine of sovereign immunity for states in federal courts was established through the Eleventh Amendment, the doctrine was extended to the federal government by the Supreme Court in *Cohens v. Virginia*.²² Chief Justice Marshall affirmed the principle in *Cohens*, but he did not supply any justification for the extension other than to state: "[T]he universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits."²³ It appears the doctrine of sovereign immunity had been accepted so readily by all from the English common law that the

15. 2 U.S. (2 Dall.) 419 (1793).

16. *Id.* at 469-79. Only one justice dissented from this decision. His dissent was based on the argument that the Court should look to the applicable common law, which was that consent to the suit by the legislature was required. *Id.* at 429 (Iredell, J., dissenting). Justice Wilson specifically rejected the whole concept of sovereign immunity in his concurring opinion. *Id.* at 453.

17. Pugh, *supra* note 5, at 485; Jaffe, *supra* note 5, at 19-20. See also *supra* note 14.

18. See Pugh, *supra* note 5, at 485.

19. *Id.*

20. *Id.* See also Jaffe, *supra* note 5, at 20.

21. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. This amendment has also been construed to bar unconsented to suits brought against a state by a citizen of that state. *Hans v. Louisiana*, 134 U.S. 1 (1890).

22. 19 U.S. (6 Wheat.) 264 (1821).

23. *Id.* at 411-12.

Court felt no compulsion to explain or justify its reasoning.²⁴ This judicial procedure of acceptance without independent justification was also reflected in the activities of the state courts, resulting in the total incorporation of the doctrine into state common law.²⁵

The doctrine remained firmly entrenched in American legal practice throughout the nineteenth century and into the twentieth. Although several justifications for immunity have been expounded upon by the courts since *Cohens*,²⁶ none have been received with much critical support.²⁷ In fact, throughout those years of acceptance, there were many scholarly attacks on the doctrine.²⁸

Significant erosion of the doctrine began after World War II.²⁹ This erosion was the result of a failure to find a sufficiently rational theory to justify the immunity doctrine and the fact that, where the immunity had been waived, the resulting judgments did not bring about the fiscal demise of the state.³⁰ During this period, the federal government, as well as most state governments, either judicially or legislatively, began to open up the courts to tort actions brought by individuals against the government entity.³¹

III. SOVEREIGN IMMUNITY IN OKLAHOMA PRE-*VANDERPOOL*

The doctrine of sovereign immunity in tort actions was first accepted by the Oklahoma courts during its territorial days in *James v. Trustees of Wellston Township*.³² In the typical fashion of many state

24. See Pugh, *supra* note 5, at 485-86.

25. See Spector, *supra* note 6, at 529 & n.20. See also Pugh, *supra* note 5, at 486-87; *id.* at 489 (discussing *United States v. Lee*, 106 U.S. 196 (1882)).

26. Courts have attempted to rationalize the doctrine on the theory ". . . that it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits. . . ." *Briggs v. Light-Boats Upper Cedar Point*, 93 Mass. (11 Allen) 157, 162 (1865); see also *Nichols v. United States*, 74 U.S. 122, 126 (1868) (sovereign immunity is founded upon public policy which is imposed by necessity); *United States v. Lee*, 106 U.S. 196, 206 (1882) (improper to force a state to submit to the jurisdiction of a court which it created); *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) ([T]here can be no legal right as against the authority that makes the law on which the right depends.").

27. See Spector, *supra* note 6, at 529 n.21. See generally Pugh, *supra* note 5, at 486-94.

28. See, e.g., Borchard, *supra* note 5, at 4-9; Pugh, *supra* note 5, at 486-94. See also Spector, *supra* note 6, at 560-61 (author argues that there is no valid justification today for sovereign immunity in Oklahoma).

29. Spector, *supra* note 6, at 529.

30. *Id.* at 529-30.

31. *Id.*

32. 18 Okla. 56, 90 P. 100 (1907). A private citizen brought suit against a township for damages allegedly sustained by the township's failure to properly maintain a highway in a reasonably safe condition. The Supreme Court of Oklahoma held that absent a specific statute imposing liability, the township (as well as the state) was immune from liability. *Id.* at 74, 90 P. at 106.

courts,³³ the Oklahoma Supreme Court merely accepted the doctrine on “public policy” grounds without any attempt to justify the doctrine or to explain the public policy³⁴ rationale. The court provided potential escape from the application of the doctrine of sovereign immunity by stating that if the state legislature passed a statute creating liability in the state, the court would have to allow the suit based on the legislature’s intent to consent to the suit.³⁵

Problems with this dictum were two-fold. First, although the court spoke in terms of consent to liability, there are two aspects involved in a state waiving its immunity; consent to liability and consent to suit.³⁶ Both aspects had to be present for a plaintiff to bring a successful tort action against the state. The second problem with the dictum resulted from state courts strictly construing all statutes which purportedly waived the state’s immunity to tort actions brought against it.³⁷ These factors resulted in the state obtaining a “broad-based protection from liability” that few plaintiffs were able to overcome.³⁸

In the early 1900’s, plaintiffs attempted to circumvent the state’s immunity protection by recharacterizing their tort claims as an unconstitutional taking of private property.³⁹ The Oklahoma Constitution states: “[p]rivate property shall not be taken or damaged for public use without

33. See *supra* note 25 and accompanying text.

34. “. . . [P]ublic policy would dictate that the state, [including its subordinate political subdivisions] for a failure to perform a public duty, would not be liable in civil damages to a citizen. . . .” *James*, 18 Okla. at 58, 90 P. at 101.

35. *Id.* at 74, 90 P. at 106.

36. See Spector, *supra* note 6, at 530 n.24.

37. See *Board of Comm’rs v. Twyford*, 39 Okla. 230, 143 P. 968 (1913). Plaintiff was seeking to recover from the county for services rendered as a *pro tempore* county judge. Plaintiff based his argument on language contained in the law setting forth the fee that a temporary judge could charge which stated: “. . . and in no event shall the county be liable for more than one-half of such costs.” Act of March 19, 1910, ch. 21, art. I, § 1832, vol. I, Rev. Laws of Okla. Ann., 482, 482. The Oklahoma Supreme Court held that all statutes purporting to give costs must be strictly construed to exclude the sovereign and that the language quoted above “. . . fell far short of saying that in such cases the county shall be liable for these fees.” *Twyford*, 39 Okla. at 232-33, 134 P. at 969-70. See also *Whiteneck v. Board of Comm’rs*, 89 Okla. 52, 213 P. 865 (1923) (workman’s compensation statute construed to only waive state’s immunity to suit, not liability); *Consolidated School Dist. No. 1 v. Wright*, 128 Okla. 193, 261 P. 953 (1927) (“sue and be sued” clause contained in school district enabling statute was construed by Oklahoma Supreme Court as not to include suits for negligence, but only referred to suits over matters within the school district’s normal scope of duties).

38. Spector, *supra* note 6, at 532.

39. *Welker v. Annett*, 44 Okla. 520, 145 P. 411 (1914) (the state killed several of plaintiff’s cattle due to the negligent manner in which the state performed a cattle dipping operation it was required to perform under Oklahoma law. In order to show that the state had waived its immunity, plaintiff attempted to recharacterize his claim as an unconstitutional taking of private property by the state under OKLA. CONST. art. II, § 24).

just compensation."⁴⁰ The theory behind the recharacterization was that through the "taking of private property for public use" clause of the Constitution, the state had waived its immunity.⁴¹ In *Welker v. Arnett*,⁴² the court rejected the plaintiff's attempted recharacterization.⁴³ Through strict construction of the Constitution, the court held that since "the damages are purely consequential, and not the direct and immediate result of the tortious act of the defendant, we cannot give our assent to this proposition."⁴⁴ The court cited no authority for its direct versus consequential distinction with respect to damages.⁴⁵ It can only be explained as a very narrow construction of the phrase "[p]rivate property . . . damaged for public use . . ."⁴⁶ as used in the Constitution.

As a result of the state judiciary's almost automatic acceptance of the doctrine of sovereign immunity and its strict construction of all legislation purporting to waive the state's immunity in tort actions, "the state and its subdivisions were wholly immune, both from suit and [liability], for the tortious acts of its agents . . ." through the 1920's.⁴⁷

During the 1930's, attacks on state sovereign immunity centered on special individualized acts brought before the legislature.⁴⁸ Such acts

40. OKLA. CONST. art. II, § 24.

41. Because of the dictum in *James*, which stated that if the state had legislatively created liability in itself the courts would have to assume the state intended to waive its immunity and consent to the suit, plaintiffs sought to use the Oklahoma Constitution with respect to the "taking of private property for public use" clause to supply the necessary legislative waiver of immunity. See *supra* note 35 and accompanying text.

42. 44 Okla. 520, 145 P. 411 (1914).

43. *Id.* at 522, 145 P. at 412.

44. *Id.*

45. *Id.*

46. OKLA. CONST. art. II, § 24.

47. Spector, *supra* note 6, at 535. Only actions for property damages resulting directly from state conduct were allowed, on the theory the state had waived its immunity completely in those types of actions based on OKLA. CONST. art. II, § 24. *Id.* In *Board of Comm'rs v. Baxter*, 113 Okla. 280, 241 P. 752 (1925), a private citizen was granted an exclusive franchise by an Oklahoma county to build a toll road in the county. After construction of the road was completed, the county revoked the franchise and seized the road. When the citizen sued, the county sought to avoid liability by claiming that the seizure of the road was a tortious act of its officers for which the county had immunity against liability. *Id.* at 283, 241 P. at 756. The Oklahoma Supreme Court held that this case fell within the *James* exception and that the "taking of private property for public use" clause of the state constitution was a legislative waiver of the county's immunity to liability for the tortious actions of its officers in this case. *Id.* Though never expressly stated by the court, it apparently found the plaintiff's damages to be a direct result of the county's tortious act, instead of a consequential result as found in the earlier *Welker* case. *Baxter* also supported the implication raised in the *Welker* case, that if a plaintiff could show his damages were the direct result of an unconstitutional taking by the state, then OKLA. CONST. art. II, § 24 acted as a complete legislative waiver of the state's immunity. However, in *Baxter* and *Welker*, the court never made any attempt to distinguish between immunity to suit and immunity to liability.

48. Spector, *supra* note 6, at 537.

sought to obtain the legislature's consent to the tort action and thereby allow the plaintiff to proceed with his cause of action against the state within the courts.⁴⁹ For the most part, attempts to obtain legislative consent failed.⁵⁰ The court persisted in focusing on the dual nature of the immunity⁵¹ and in holding that in tort actions, waiver of immunity to suit could be obtained on an individualized basis from the state legislature,⁵² but waiver to liability on an individualized basis was unconstitutional.⁵³ Therefore, unless there was a preexisting obligation owed to the plaintiff by the state⁵⁴ or the plaintiff could show existing legislation that contained a general waiver of the immunity to liability,⁵⁵ the state's immunity to tort actions would be upheld by the courts.⁵⁶

49. See, e.g., *Hawks v. Bland*, 156 Okla. 48, 9 P.2d 720 (1932). The Oklahoma Supreme Court refused to require the state to pay a five thousand dollar death benefit, which had been approved by a legislative resolution, to the widow of a state employee who died as the result of injuries sustained in the course of his employment. The court held that the benefit was an unconstitutional gift of public moneys for private purposes, as the statute sought to appropriate money to a person to whom the state had no legal obligation. *Id.* at 49-51, 9 P.2d at 722-24; see also *Wright v. Carter*, 161 Okla. 281, 18 P.2d 522 (1933) (selective waiver of immunity to liability was fatal to legislative resolution allowing plaintiff to bring his action against the state, even though the resolution did not assume state liability as it did in *Bland*, but only allowed plaintiff to present his claim to the Industrial Commission for determination of liability); *State v. Fletcher*, 168 Okla. 538, 34 P.2d 595 (1934) (action to recover damages to plaintiff's dairy cattle herd, directly caused by the state's action, where a legislative resolution waiving only immunity to suit was upheld by the court).

50. See, e.g., *Bland*, 156 Okla. 48, 9 P.2d 720 (1932); *Wright*, 161 Okla. 281, 18 P.2d 522 (1933).

51. See *supra* note 36 and accompanying text (immunity to suit and immunity to liability).

52. See, e.g., *State v. Adams*, 187 Okla. 673, 676-77, 105 P.2d 416, 419 (1940) (waiver of immunity to suit on an individual basis not unconstitutional).

53. *Id.* at 677, 105 P.2d at 419-20. The court distinguished *Jack v. State* on the basis that the special act in *Jack* sought not only to waive immunity to suit but also immunity to liability on an individual basis which was unconstitutional. *Jack*, 183 Okla. 375, 82 P.2d 1033 (1937). In *Jack*, the legislative resolution directed to one specific individual, waiving the state's immunity to liability, was held unconstitutional as it violated OKLA. CONST. art. V, § 59 which requires that "where a general law can be made applicable, no special law shall be enacted." *Jack*, 183 Okla. at 376-77, 380, 82 P.2d at 1034, 1038.

54. See, e.g., *State Highway Comm'n v. Horn*, 187 Okla. 605, 608, 105 P.2d 234, 237 (1940) (court citing with approval a Pennsylvania case that held where liability is preexisting, waiver of immunity to suit by a special act is constitutional). See also *Spector*, *supra* note 6, at 546 n.84 (author discusses a series of cases involving preexisting obligation owed to a plaintiff due to the improper withholding of tax money from plaintiff by the state).

55. See, e.g., *State v. Fletcher*, 168 Okla. 538, 540, 34 P.2d 595, 597 (1934) (court held that article 2, section 24, of the state constitution acted as a general waiver of immunity to liability available to all citizens who have had private property taken or damaged by the state).

56. The only exception to this general proviso appeared to be in the area of eminent domain. If plaintiff's land had directly been taken he could sue in inverse condemnation, and article 2, section 24 was interpreted as waiving both substantive immunity and immunity from suit. If, however, plaintiff's damages were merely consequential to the state's construction of a public improvement, article 2, section 24 was held to provide the basis of state liability; unfortunately there was no remedy available. If the legislature authorized plaintiff's suit in a special bill, he could proceed; if they did not, he was remediless. *Spector*, *supra* note 6, at 546.

After the brief flurry of activity during the 1930's noted above, the status of Oklahoma's sovereign immunity laws remained unchanged for the most part until the 1970's.⁵⁷ It was during the 1970's that the Oklahoma courts and Legislature began to respond to the growing dissatisfaction being expressed about the retention of sovereign immunity by the state in tort actions.

During this period the governmental versus proprietary activity limitation on immunity, long applied to municipalities,⁵⁸ was extended by the court to counties,⁵⁹ and eventually in 1980 to the state and its agencies.⁶⁰ Under the governmental versus proprietary distinction, sovereign immunity was waived for all tortious conduct that was committed by the governmental unit in its proprietary capacity, but the immunity was retained for conduct performed in its governmental capacity.⁶¹ The test, however, proved difficult to apply except in the most obvious situations, which resulted in the courts having to make decisions concerning the distinction on a case by case basis.⁶²

The 1970's also saw a further erosion of the state's sovereign immunity due to liability insurance purchased by the state.⁶³ Where the state purchased liability insurance to cover specific situations, the courts would imply that the governmental unit had consented to waiving its immunity as to those situations.⁶⁴ The basis for this exception was that "insurance companies would be receiving premiums on policies and they would never have to honor any claims. The courts refuse to extend the

57. *Id.* at 547.

58. *See* Oklahoma City v. Hill, 6 Okla. 114, 50 P. 242 (1897) (municipality immune from liability for torts arising out of actions connected with governmental functions, but no immunity where tortious act connected with proprietary functions).

59. *See* Terry v. Edgin, 598 P.2d 228 (Okla. 1979) (counties can be held liable for their tortious acts committed during performance of proprietary functions).

60. *See* Hershel v. University Hosp. Found., 610 P.2d 237 (Okla. 1980) (state not immune from liability for tortious conduct arising from state proprietary functions).

61. *See generally* W. PROSSER & W. KEETON, THE LAW OF TORTS § 131, at 1053 (5th ed. 1984) (although the author is addressing municipal immunity, the principle of the governmental versus proprietary distinction is the same for counties and the state).

62. *See* Hershel v. University Hosp. Found., 610 P.2d 237, 243 (Okla. 1980) (Opala, J., dissenting) "State functions do not naturally fall into a dichotomous governmental/proprietary division. Our attempt to so arrange them is bound to be productive of much sophistry *via* a strained application of ill-suited test criteria." *Hershel*, 610 P.2d at 243. *See generally* Spector, *supra* note 6, at 554-56 (author states that the court has not been clear on how the distinction is to be applied); W. PROSSER & W. KEETON, *supra* note 61, at 1053-54 (authors claim there is no rational solution because the distinction itself is unworkable).

63. *See* Spector, *supra* note 6, at 556-59.

64. *See* Lamont Indep. School Dist. I-95 v. Swanson, 548 P.2d 215, 217 (Okla. 1976) (court extended liability insurance exception established in Schrom v. State Indus. Dev., 536 P.2d 904 (Okla. 1975) (by dropping the requirement that the purchase of liability insurance had to be specifically authorized by the legislature, but requiring only that the insurance was actually purchased).

doctrine of sovereign immunity to the insured and the insured is estopped from claiming acts of the sovereign are governmental or proprietary.”⁶⁵ However, this waiver of the immunity was not complete. It was assumed that the governmental entity had only waived its immunity up to the amount covered by the insurance policy.⁶⁶ If the plaintiff sought damages in excess of the policy amount, he had to base his claims for the excess on some other exception to the governmental unit’s sovereign immunity.⁶⁷

In summary, the status of Oklahoma’s sovereign immunity law prior to the *Vanderpool v. State*⁶⁸ decision, was that the state enjoyed complete immunity in tort actions brought against it unless: 1. the tortious activity in which the state was involved was being conducted in a proprietary, as opposed to a governmental, capacity;⁶⁹ or 2. the state had purchased liability insurance, in which case implied consent to waive its immunity was assumed, up to the amount of the policy;⁷⁰ or 3. the plaintiff had obtained a “constitutionally complete” consent from the legislature to bring his tort cause of action against the state in its courts.⁷¹

IV. THE *Vanderpool*⁷² DECISION

As late as March 1983, the Oklahoma Supreme Court refused to overturn the doctrine of sovereign immunity within the state.⁷³ It based its refusal on the belief that “if sovereign immunity is to be abrogated, it should be done by the Legislature and not by the courts.”⁷⁴ The view that the legislature, and not the judiciary, should be responsible for overturning the state’s sovereign immunity laws was attacked by sources both

65. Berry, *The Dragon of Sovereign Immunity—A Delay of the Slaying?*, 50 OKLA. B.J. 884, 886 (1979). See also Comment, *Torts: Sovereign Immunity: The Changing Doctrine of the Immunity of the State in Tort in Oklahoma*, 25 OKLA. L. REV. 592, 596 (1972) (the rationale for sovereign immunity is to protect public funds; if the state has obtained insurance the rationale for the immunity ceases).

66. See, e.g., *Lamont*, 548 P.2d at 217 (Oklahoma Supreme Court held that obtaining liability insurance was a waiver of the governmental immunity only up to the extent of the insurance coverage).

67. Berry, *supra* note 65, at 886.

68. 672 P.2d 1153 (Okla. 1983).

69. See *supra* notes 58-62 and accompanying text.

70. See *supra* notes 63-67 and accompanying text.

71. See *supra* notes 35-56 and accompanying text.

72. 672 P.2d 1153 (Okla. 1983).

73. See *Ruble v. State Dep’t of Transp.*, 660 P.2d 1049 (Okla. 1983) (court held that building and maintaining state highways was a governmental function for which the state retained immunity against any liability arising therefrom).

74. *Id.* at 1050.

inside⁷⁵ and outside the court.⁷⁶ These attacks were based on the fact that the state's sovereign immunity laws were judicially created.⁷⁷

In July, 1983, the Oklahoma Supreme Court in *Vanderpool v. State*⁷⁸ finally reviewed its position on the sovereign immunity issue. The plaintiff in *Vanderpool* was an employee of the Oklahoma Historical Society at one of the state's historical sites.⁷⁹ Plaintiff was injured on the grounds of the historical site during the course of her working hours by a defective mower operated by a fellow employee.⁸⁰ The injury resulted in permanent loss of sight in her right eye.⁸¹ Plaintiff alleged negligence on the part of the state and the state agency (hereinafter referred to as defendants) in maintaining and operating the defective mower.⁸²

Defendants made a motion for summary judgment in district

75. See, e.g., *Walton v. Charles Pfizer & Co.*, 590 P.2d 1190, 1194 (Okla. 1978) (Opala, J., specially concurring) "The archaic concept of immunity unfairly singles out our government, *qua* tortfeasor, for a legal treatment that is vastly more favorable than that accorded an ordinary citizen whose actionable conduct inflicts injury on another person." *Id.* at 1195; *State Dep't of Highways v. McKnight*, 496 P.2d 775, 784 (Okla. 1972) (Hodges, J., dissenting) "[T]he doctrine of governmental immunity as court made law should be abrogated." *Id.*; *Newman v. State Bd. of Regents*, 490 P.2d 1079, 1081, 1085 (Okla. 1972) (Hodges & McInerney, JJ., dissenting) "Governmental immunity is an anachronism that has long outlived its purposes, design or reasoning. The doctrine had its dubious inception in the feudal days where the authority was the King having some claim of divine rights and the medieval notion that the King can do no wrong." *Id.* at 1081 (Hodges, J., dissenting). "Needless to say the ancient reasons are no longer applicable, if they ever were. We have no king and no claim of divinity for our government has been asserted. Yesterday's excuses are not today's answers." *Id.* at 1082. "The reasons for abolishing the doctrine of governmental immunity are overwhelming and persuasive. A primitive concept that prevents a person from being justly compensated for a serious, painful and permanent injury just because the wrong doer was an employee of the state should be reexamined and altered." *Id.* at 1085. "I believe Justice Hodges is correct in his analysis, and criticism, of the outmoded doctrine of governmental immunity when applied to [this case]. . . ." *Id.* (McInerney, J., dissenting).

76. See Spector, *supra* note 6, at 560. "No commentator in the last half-century has proffered a good word concerning sovereign immunity. A legal system that 'singles out our government, *qua* tortfeasor, for legal treatment that is vastly more favorable than accorded an ordinary citizen' is inherently unfair." *Id.* (quoting Justice Opala's dissent in *Walton v. Charles Pfizer & Co.*, 590 P.2d 1190, 1194 (Okla. 1978)). See Berry, *supra* note 65, at 886-88. "It would seem that the doctrine of sovereign immunity is headed for the scrapheap to join . . . other unfair and antiquated doctrines that have lingered in our law for much longer than they should have. Oklahoma courts should realize the idea that the King can do no wrong has no business in our legal system." *Id.* at 887-888.

77. See Spector, *supra* note 6, at 560.

The entire history of this doctrine shows that, apart from the motor vehicle immunity statutes, sovereign immunity was created by the court, modified often by the court, and on at least one occasion, overturned by the court. There is no sound policy reason for the court to believe it has the power to overturn contractual immunity but not tort immunity. The time is long past when the court can disclaim responsibility for its own progeny.

Id.

78. 672 P.2d 1153 (Okla. 1983).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 1153-54.

court.⁸³ The defendants based their motion on the claim that their conduct was governmental in nature and therefore immune from tort actions.⁸⁴ The district court granted the defendants' motion and dismissed the plaintiff's action.⁸⁵ Plaintiff then appealed the district court's decision to the Oklahoma Supreme Court.⁸⁶

The supreme court first reviewed the status of the Oklahoma Historical Society. After considering the "nature, purposes, powers and duties" of the Society as set forth in its enabling statute, the court found the Society to be "an agency of the State."⁸⁷ The court then noted that: "[t]he case before us places squarely in issue the doctrine of sovereign immunity and impels us to reexamine the viability and efficacy of that doctrine as applied to tort liability of the State, the counties and of other governmental entities within the State of Oklahoma."⁸⁸

Next, the court briefly reviewed the history of sovereign immunity, from its ancient English roots, through its incorporation into American common law, and finally to its adoption by the states.⁸⁹ The court reviewed the governmental versus proprietary distinction, noting that with the increased complexity of modern governments, it was becoming almost impossible for courts to make the distinction.⁹⁰ The court took note of the inroads made into the doctrine of sovereign immunity by the federal government,⁹¹ by sister states,⁹² and even with respect to its application in Oklahoma.⁹³

83. *Id.* at 1154.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* The language used by the court was especially important in that it spelled out the all-encompassing scope its reexamination was to have with respect to tort sovereign immunity.

89. *Id.*

90. *Id.* at 1154-55. The court stated that "[j]udicial attempts to grapple with what has become a multi-headed medusa has resulted in confusion and uncertainty all too painfully apparent to legal scholars, and an inability on the part of the courts to evolve any definitive guide lines for the demarcation between governmental and proprietary functions." *Id.*

91. *Id.* at 1155. Through the Federal Tort Claims Act, initially adopted in 1946, the federal government waived its immunity

. . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b) (1982).

92. *Vanderpool*, 672 P.2d at 1155. The court noted that only five states, including Oklahoma, had not abolished or severely restricted the application of the doctrine. *Id.*

93. *Id.* The court cited to the Political Subdivision Tort Claims Act, OKLA. STAT. tit. 51, §§ 151-170 (1981) (extending liability to state political subdivisions, i.e. counties, cities, public trusts

After completing its review of the history of sovereign immunity, the court held "that the governmental-proprietary-function inquiry shall no longer be determinative in assessing liability for torts as to all levels of government in this State."⁹⁴ The court then announced that the new standard for determining the State's liability in tort causes of action would be:

A state or local governmental entity is liable for money damages for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any governmental entity or any employee or agent of the governmental entity while acting within the scope of the governmental entity's office, and purpose for which it is created, under circumstances where the entity, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Provided, however, said governmental entity is immune from tort liability for acts and omissions constituting

- (a) the exercise of a legislative or judicial function, and
- (b) the exercise of an administrative function involving the determination of fundamental governmental policy.

And further provided, that the repudiation of general tort immunity as hereinabove set forth does not establish liability for an act or omission that is otherwise privileged or is not tortious.⁹⁵

The new standard set forth by the court closely resembles that expressed in the Federal Tort Claims Act.⁹⁶ Namely, the state and its political subdivisions would be held to the same tort standard as a private person in the same situation, subject to certain limitations.⁹⁷ The new standard is very broad in scope, especially in light of the few exceptions listed.⁹⁸

and school districts, for the tortious conduct of its employees acting within the scope of their employment or duties, with specified limitations to the liability); *Hershel v. Univ. Hosp. Found.*, 610 P.2d 237 (Okla. 1980) (no immunity for tortious conduct performed by the state in its proprietary capacity); *Gable v. Salvation Army*, 186 Okla. 687, 100 P.2d 244 (1940) (no immunity for charitable corporations similar to sovereign immunity); and *Schrom v. Okla. Indus. Dev.*, 536 P.2d 904 (Okla. 1975) (purchase of liability insurance by governmental agency pursuant to legislative authority constitutes a consensual waiver of sovereign immunity up to the policy limit).

94. *Vanderpool*, 672 P.2d at 1156.

95. *Id.* at 1156-57 (note that the decision as published is printed with the cited quote appearing entirely in capital letters).

96. 28 U.S.C. § 1346(b) (1982); see *supra* note 91.

97. Sovereign immunity will still apply to the service of legislative and judicial functions by governmental entities as well as to administrative functions which involve the determination of fundamental governmental policy. *Vanderpool*, 672 P.2d at 1157. The court noted that the new standard did not create any new liability for acts that were otherwise privileged or not tortious. *Id.* The court also noted that the state would still not be liable for punitive damages. *Id.* at n.10.

98. By comparison, the Federal Tort Claims Act contains many substantive and procedural limitations to liability, and there have been numerous judicial interpretations of the statutory lan-

The court concluded its opinion in *Vanderpool* by stating it normally would have deferred a decision such as this to the legislature; [b]ut having come to the conclusion that the judicially recognized doctrine of governmental immunity in its present state under the case law is no longer supportable in reason, justice or in light of the overwhelming trend against its recognition, our duty is clear. Where the reason for the rule no longer exists, that alone should toll its death knell.⁹⁹

The court, in deference to the legislature, specifically limited its ruling to the “judicially created and recognized doctrine of governmental immunity”¹⁰⁰ and noted that its holding had no impact on “any act of the Legislature in the area of governmental immunity whether presently in effect or hereafter passed.”¹⁰¹ In further deference to the legislature, the court specifically stated that its opinion, with the exception of the present case, would not become effective until October 1, 1985.¹⁰²

By setting the effective date of the opinion over two years into the future, the court hoped to provide the legislature with ample time to consider the whole area of sovereign immunity and its applicability in the state.¹⁰³ In fact, the court expressed the opinion that the legislature may wish to reinstate the doctrine of sovereign immunity by statute, implying that it would be constitutionally permissible.¹⁰⁴ The opinion further implies that the court no longer wanted to be held responsible for the doctrine of sovereign immunity in Oklahoma.¹⁰⁵

Three justices dissented from the majority opinion.¹⁰⁶ Justice Irwin noted that the abrogation of the doctrine of sovereign immunity should

guage further limiting the scope of the Act. See generally W. PROSSER & W. KEETON, *supra* note 61, at 1035-40 (discussing the various limitations).

99. *Vanderpool*, 672 P.2d at 1157.

100. *Id.* (emphasis added); see also Spector, *supra* note 6, at 560 (practically all law in the area of state sovereign immunity was judicially created).

101. *Vanderpool*, 672 P.2d at 1157.

102. *Id.*

103. We are aware of and sensitive to the effect that the immediate application of the rules of law herein enunciated would have upon the various governmental entities affected thereby. These are matters which lie within the sphere of the Legislature alone. We invoke its consideration of the many problems presented, including whether some or all of the governmental entities should be insulated from unlimited tort liability through the enactment of comprehensive or specific Tort Claims Acts which limit or prescribe conditions of liability, their insurance against loss, the maximum monetary liability to be allowed. . . . Ample time for consideration of these matters must be afforded.

Vanderpool, 672 P.2d at 1157.

104. *Id.* The court in its opinion asked the legislature to consider “[w]hether it is the will of the People of the State of Oklahoma, as expressed through the Legislature, that governmental immunity be established by statute. . . .” *Id.*

105. See *Vanderpool*, 672 P.2d at 1157; see also *supra* note 99 and accompanying text.

106. *Vanderpool*, 672 P.2d at 1157 (Barnes, C.J., Irwin, J. & Hargrave, J., dissenting).

come from the legislature, not the courts.¹⁰⁷ He supported his position by noting that the legislature has had ample opportunity to abolish sovereign immunity if it so desired.¹⁰⁸ Moreover, the fact that the Legislature had not chosen to abrogate sovereign immunity was, in Justice Irwin's opinion, a clear demonstration of legislative intent to retain the doctrine in its present form.¹⁰⁹

V. OKLAHOMA'S GOVERNMENTAL TORT CLAIMS ACT¹¹⁰

A. *Analysis of the Act*

The court in *Vanderpool* sought to give the Oklahoma Legislature ample time to consider its position on sovereign immunity by setting the effective date of the court's decision at October 1, 1985.¹¹¹ It did not take the legislature the full two years to consider its position; on May 23, 1984 the Governmental Tort Claims Act was passed.¹¹²

In drafting the Act, the legislature extensively used the then existing Political Subdivision Tort Claims Act,¹¹³ as the framework for the new Act.¹¹⁴ The Act is designed to be implemented in two stages. The first stage addresses only political subdivision liability in tort actions and became effective July 1, 1984.¹¹⁵ The second stage establishes the liability of the state and its agencies, with an effective date of October 1, 1985.¹¹⁶

107. *Id.* at 1158.

108. *Id.* The Legislature had acted in the area of sovereign immunity in the past by enacting the Political Subdivision Tort Claims Act, OKLA. STAT. tit. 51, §§ 151-170 (1981) (abolishing sovereign immunity for municipalities, school districts, counties and certain public trusts, within stated liability limitations); OKLA. STAT. tit. 47, §§ 157.1-158.2 (1981) (requiring insurance for state owned motor vehicles and equipment and waiving sovereign immunity up to the limits of the policy); OKLA. STAT. tit. 74, § 20f-20h (1981) (requiring the Attorney General to defend state officers and employees sued in performance of their official duties, but expressly excluding the payment by the state of any judgment subsequently rendered against that official or employee).

109. *Vanderpool*, 672 P.2d at 1158.

110. Governmental Tort Claims Act, OKLA. STAT. tit. 51, §§ 151-171 (Supp. 1984) (effective October 1, 1985; amending The Political Subdivision Tort Claims Act, OKLA. STAT. tit. 51, §§ 151-170 (1981); hereinafter referred to as the Act).

111. *Vanderpool*, 672 P.2d at 1157; see also *supra* note 102 and accompanying text.

112. OKLA. STAT. tit. 51, §§ 151-171 (Supp. 1984) (effective October 1, 1985).

113. OKLA. STAT. tit. 51, §§ 151-170 (1981).

114. The Act was written amending the original Political Subdivision Tort Claims Act and to a large extent it utilized the structure of that act. See Public Officers and Employees-Tort Liability, 1984 Okla. Sess. Laws ch. 226, 811 (containing that portion of the Act which becomes effective October 1, 1985) and Public Officers and Employees-Tort Liability, 1984 Okla. Sess. Laws ch. 228, 825 (containing that portion of the Act which became effective July 1, 1984).

115. The Political Subdivision Tort Claims Act, OKLA. STAT. tit. 51, §§ 152-155, 157, 163 (Supp. 1984); see also 1984 Okla. Sess. Laws ch. 228, 825, 832.

116. See OKLA. STAT. tit. 51, §§ 151-171 (Supp. 1984); see also 1984 Okla. Sess. Laws ch. 226, 811, 821. It appears the legislature wished to delay enactment of the new law until the effective date of the *Vanderpool* decision. See *supra* note 102 and accompanying text.

With the exception of the exclusion of the state and its agencies, there is very little substantive difference between the two stages,¹¹⁷ and, therefore, this comment will only discuss the Act as it appears in its final, complete form.

1. Sovereign Immunity Statutorily Established

By section 152.1(A) of the Act, the Oklahoma Legislature incorporates the doctrine of sovereign immunity, with respect to tort liability, into state law.¹¹⁸ The immunity covers "[t]he state, its political subdivisions, and all of their employees acting within the scope of their employment, whether performing governmental or proprietary functions. . . ."¹¹⁹

Two points should be noted with respect to the scope of immunity. First, immunity attaches only in situations where the tortious conduct was performed within the scope of employment of the party committing the wrong.¹²⁰ Thus, there is no immunity for actions outside the scope of employment. If a plaintiff can show that the defendant was acting outside the scope of his employment, the defendant will be barred from raising the immunity defense and the plaintiff, while having a defendant against whom he may bring an action, will not be able to get at the deep pockets of the government entity.¹²¹ The Act defines "scope of employment" as "performance by an employee acting in good faith within the duties of his office or employment or of tasks lawfully assigned by a competent authority but shall not include corruption or fraud."¹²² Thus, corruption and fraud are expressly outside the scope of employment.

The second point concerning the scope of the immunity is that the distinction between governmental and proprietary functions is no longer

117. Except for the addition of certain words and provisions that relate exclusively to the state, the only significant differences between the two stages are:

1. The political subdivision act which became effective July 1, 1984, retained for the most part the procedural rules contained in the original Political Subdivision Tort Claims Act, OKLA. STAT. tit. 51, §§ 151-170 (1981). These procedures were significantly changed in the final Governmental Tort Claims Act. See *infra* notes 184-222 and accompanying text.

2. The July 1, 1984 political subdivision act does not contain the clause which statutorily establishes the doctrine of sovereign immunity in the state, nor the clause which waives the immunity. See *infra* notes 118-128 and accompanying text.

118. "The State of Oklahoma does hereby adopt the doctrine of sovereign immunity." OKLA. STAT. tit. 51, § 152.1(A) (Supp. 1984).

119. *Id.*

120. *Id.*

121. If the party committing wrong was not acting within the scope of his employment then the governmental entity probably would not be held vicariously liable. See W. PROSSER & W. KEETON, *supra* note 61, at 502.

122. OKLA. STAT. tit. 51, § 152(8) (Supp. 1984).

significant in making a determination of immunity.¹²³ This change should receive approval by both the courts and legal scholars, who have long criticized the distinction as being an unworkable standard "resulting in confusion and uncertainty."¹²⁴

2. Waiver of Immunity

The general waiver clause of the Act provides that "[t]he state, only to the extent and in the manner provided in this act, waives its immunity and that of its political subdivisions."¹²⁵ Waiver of immunity is limited to the terms specifically stated in the Act. The Legislature is thus clearly expressing its intent that the courts are not to expand the scope of liability to which the state or its political subdivisions may be exposed, beyond that provided in the Act. Coupling this expression of intent with the court's policy of strictly construing all waivers of governmental immunity,¹²⁶ it is doubtful a plaintiff will be able to establish a claim against the state or its political subdivision unless his case complies strictly with this Act.

The general waiver clause also states, "it is not the intent of the state to waive any rights under the Eleventh Amendment to the United States Constitution."¹²⁷ Since the eleventh amendment bars suits by individuals against a state in federal court,¹²⁸ it appears a plaintiff will have to initiate his cause of action in state court.

3. Standard for Finding Liability

The standard for determining liability under the Act is: "[t]he state or a political subdivision shall be liable for loss resulting from its tort or the torts of its employees . . . only where the state or political subdivision, if a private person or entity, would be liable for money damages under the laws of this state."¹²⁹ The standard allows that only claims for "money damages" can be brought against the state. Sovereign immunity is not waived for all other claims of relief.¹³⁰

123. *Id.* § 152.1(A).

124. *Vanderpool*, 672 P.2d at 1154-55; see also *supra* note 90 and accompanying text.

125. OKLA. STAT. tit. 51, § 152.1(B) (Supp. 1984).

126. See *supra* note 37 and accompanying text.

127. OKLA. STAT. tit. 51, § 152.1(B) (Supp. 1984).

128. U.S. CONST. amend. XI; see also *supra* notes 20-21 and accompanying text.

129. OKLA. STAT. tit. 51, § 153(A) (Supp. 1984). Though the Act states that the state or political subdivision will be liable for money damages to the same extent as if it were a private person, it specifically excludes the award of any punitive or exemplary damages against the state or political subdivision. *Id.* § 154(B).

130. The Federal Tort Claims Act uses similar language limiting liability to only claims request-

This section of the Act also states that the liability that may be charged to the state or political subdivision, as determined by the standard, is "subject to the limitations and exceptions specified in the act. . . ."¹³¹ Also, it is noted twice in this section that the state or political subdivision is not liable for the acts or omissions of its employees performed outside the scope of their employment.¹³² Again, the legislature placed heavy emphasis on restricting liability as much as possible. The foregoing is apparent when considered in light of subsection B of this section which states: "[t]he liability of a political subdivision under this act shall be exclusive and in place of all other liability of the state, a political subdivision or employee at common law or otherwise."¹³³

4. Limitations to Liability

a. Monetary limitations

Severe monetary limitations are placed on any recoveries which can be obtained by a plaintiff. Claims against the state or political subdivisions cannot exceed:

1. \$25,000 per person per accident or occurrence for property losses;¹³⁴
2. \$100,000 per person per accident or occurrence for any other type of loss¹³⁵ (except state teaching hospitals which have a \$200,000 limit); and
3. \$1,000,000 for all claims per accident or occurrence.¹³⁶

The third monetary limitation expressly provides that regardless of the number of parties injured or the extent of their injuries, the state or political subdivision cannot be held liable for more than one million dollars, providing all injuries arise from the same accident or occurrence.¹³⁷ To avoid the situation where the first to sue would be the only party to recover anything, the Act allows any party to the action to petition the

ing money damages, 28 U.S.C. § 1346(b) (1982). However, this has been interpreted by the federal courts not to bar declaratory relief requested in conjunction with money damages, on the basis that declaratory judgments are procedural. *In re Gabel*, 350 F. Supp. 624 (C.D. Cal. 1972).

131. OKLA. STAT. tit. 51, § 153(A) (Supp. 1984).

132. *Id.*

133. *Id.* § 153(B).

134. *Id.* § 154(A)(1).

135. *Id.* § 154(A)(2).

136. *Id.* § 154(A)(3).

137. This may be of special concern to those who are injured by a catastrophe at a municipal stadium or some other publicly owned facility. To reduce the hardships that might accompany such an event, government bodies should make sure that promoters who use public facilities have sufficient liability insurance to cover these situations as the government's immunity will be triggered for any amount over one million dollars.

court with jurisdiction for apportionment among all the parties of any recoveries made against the state or political subdivision, if the total award for all claims would exceed the statutory maximums.¹³⁸

Furthermore, this section of the Act gives the state or political subdivision the right to petition the court to join all parties and actions arising out of a single accident or occurrence¹³⁹ or to "interplead in any action which may impose on it any duty or liability pursuant to this act."¹⁴⁰ Also, the state or political subdivision can sever itself from any other person or entity¹⁴¹ and be held liable for only "that percentage of total damages that corresponds to its percentage of total negligence"¹⁴² up to the maximum liability limits established by this section.¹⁴³ It appears the state wishes to give itself as much flexibility as it lawfully can obtain, while limiting the injured party's options to the greatest extent possible.

b. Substantive limitations

There are twenty eight specifically enumerated substantive limitations on governmental liability contained in the Act.¹⁴⁴ These substantive limitations can be divided into four general categories: 1. governmental, 2. police-military, 3. transportation-weather, and 4. miscellaneous.

1. *governmental*

The limitations in this category provide expressly for the disallowance of all losses or claims arising from; legislative¹⁴⁵ or judicial¹⁴⁶ functions; adoption or enforcement of or the failure to adopt or enforce any law, whether or not such law is valid;¹⁴⁷ execution or enforcement of any lawful court orders;¹⁴⁸ and assessment or collection of any taxes or fees.¹⁴⁹ Also disallowed are any claims or losses resulting from the li-

138. OKLA. STAT. tit. 51, § 154(C) (Supp. 1984).

139. *Id.* § 154(D).

140. *Id.*

141. *Id.* § 154(E).

142. *Id.*

143. *Id.*

144. *Id.* §§ 155(1)-(27), § 155.1.

145. *Id.* § 155(1).

146. *Id.* § 155(2). This exemption to liability includes quasi-judicial and prosecutorial functions.

147. *Id.* § 155(4).

148. *Id.* § 155(3).

149. *Id.* § 155(11) (this exemption to liability includes special assessments, license or registration fees, or other lawfully imposed fees or charges).

censing¹⁵⁰ or inspection¹⁵¹ powers of the governmental unit; and any claim relating to the placement of children by state or political subdivision employees.¹⁵² Finally, the Act denies liability for losses or claims which result from acts which are within the discretionary powers of the state, political subdivision, or an employee of either.¹⁵³

This last exception to liability for discretionary acts or omissions will probably result in additional litigation, because the Oklahoma Supreme Court has not addressed the issue in any great detail.¹⁵⁴ It may be beneficial for a thorough analysis of Oklahoma's Governmental Tort Claims Act to look at how the federal courts have handled this issue, as the Federal Tort Claims Act contains a similar discretionary exception.¹⁵⁵

The leading federal case is *Dalehite v. United States*.¹⁵⁶ In *Dalehite*, the United States Supreme Court held that the discretionary exception to liability would apply where the claimed tortious conduct involved governmental policy judgments or decisions.¹⁵⁷ The court equated policy judgment with government activities at the planning level¹⁵⁸ and to imply that routine decisions made at the operational level of government would not fall within the discretionary exception.¹⁵⁹ Other federal cases dealing

150. *Id.* § 155(12) (this exemption to liability includes, but is not limited to, issuance, denial, suspension or revocation of licenses).

151. *Id.* § 155(13) (this exemption to liability includes failure to inspect or negligent inspection of any real or personal property).

152. *Id.* § 155(25).

153. *Id.* § 155(5).

154. There is only one Oklahoma Supreme Court decision that refers to the discretionary exception contained in the original Political Subdivision Tort Claims Act. In that case the court held as a matter of law that police and traffic regulations concerning the installation and maintenance of traffic signs were discretionary functions, but the court did not further explain the meaning of "discretionary." *Ochoa v. Taylor*, 635 P.2d 604, 608 (Okla. 1981).

155. No waiver of governmental immunity for "[a]ny claim based upon . . . the exercise or performance or the failure to exercise or perform a discretionary function or duty. . . ." 28 U.S.C. § 2680(a) (1982). The theory behind the discretionary exception is to insure that the judiciary does not exercise any control over activities that are legislative or executive in nature and thereby preserve the separation of power between the three branches of government. *See* W. PROSSER & W. KEETON, *supra* note 61, at 1039.

156. 346 U.S. 15 (1953), *reh'g denied*, 347 U.S. 924 (1954). The government was held not liable for an explosion that occurred after fertilizer, made from explosive material, under government directions and specifications and in accordance with a government plan, was loaded onto a ship in Texas City. It had been claimed that the government was negligent in controlling the manufacture, handling and shipping of the fertilizer. The Court held that since all of the culpable government decisions were made at the planning level, the government had immunity under the discretionary exception. *Id.* at 42.

157. *Dalehite*, 346 U.S. at 40-43 (1953).

158. *Id.*

159. *Id.* Although *Dalehite* seemed to stretch the planning versus operational distinction to an extreme in order to find a planning function for which the government was not liable, other federal

specifically with the discretionary exception have focused on whether there were any applicable standards that the government entity was required to comply with by law.¹⁶⁰ Such cases have recognized that the pre-existence of appropriate standards, which govern the activity of the entity, leave little room for discretion.¹⁶¹ Because of the innumerable fact variations possible in today's complex government, the Oklahoma courts will probably find it an arduous task to establish a single test which is both manageable and predictable when applied to the discretionary exception issue.¹⁶² One wonders whether the legislature has replaced the old governmental versus proprietary distinction with an equally vague and arbitrary standard.

2. *police-military*

In this grouping of substantive limitations provided for in the Act, liability is rejected where the claim or loss results from "[c]ivil disobedience, riot, insurrection or rebellion or the failure to provide, or the method of providing, police, law enforcement or fire protection."¹⁶³ Liability is disavowed where it is the result of either an expressed or implied lawful entry onto any property.¹⁶⁴ Moreover, claims or losses which are the result of operations at any correctional or incarceration facility,¹⁶⁵ or are related to any court-ordered or administered work release program are exempted.¹⁶⁶ "The activities of the National Guard, the militia or other military organization administered by the Military Department of the State . . ." are also exempted from liability under the Act.¹⁶⁷ The

cases have held that after the decision has been made at the planning level, the execution of that plan puts the activity into the operational level and, therefore, must be performed with reasonable care. See, e.g., *Indian Towing Co. v. United States*, 350 U.S. 61 (1955) (the court held that after the government had exercised its discretion to build and operate a lighthouse at a specific location, it had to operate the facility with due care).

160. See, e.g., *Barton v. United States*, 609 F.2d 977 (10th Cir. 1979). The case involved a claim for damages due to the alleged unlawful acts of government agents in ordering a temporary discontinuance of grazing on public lands for which valid grazing permits existed. The court of appeals held that since there were no "fixed standards or guides" by which the government agents could determine the necessity for the temporary closing of the grazing areas due to drought, the decision was wholly a matter of judgment and within the discretionary exception. *Id.* at 980.

161. See W. PROSSER & W. KEETON, *supra* note 61, at 1042.

162. "The distinction between planning and operational decisions, if workable at all, is at best difficult to apply. . . ." *Id.* at 1041. "Probably no one test will control the decision on discretionary immunity." *Id.*

163. OKLA. STAT. tit. 51, § 155(6) (Supp. 1984).

164. *Id.* § 155(9).

165. *Id.* § 155(23) (exemption to liability includes the operation of jails and prisons, and any injuries resulting from the parole or escape of prisoners or injuries between prisoners).

166. *Id.* § 155(21).

167. *Id.* § 155(22).

military activity exception is limited to situations where conduct giving rise to the claims was performed in accordance with lawful orders during a riot, national disaster or military attack.¹⁶⁸

3. *transportation-weather*

This general category of substantive limitations disallows claims or losses resulting from accidents or events occurring on public ways or in public places due to weather conditions,¹⁶⁹ or from claims or losses resulting from the maintenance of state highways.¹⁷⁰ Liability is also denied for most claims or losses relating to the operation or non-operation of traffic signs and signals.¹⁷¹ The Act specifically excludes liability resulting from decisions concerning the initial placement, alteration or change of traffic signs or signals, based on the fact that such decisions are discretionary.¹⁷² Finally, a separate section of the Act excludes all actions or recoveries against the Oklahoma Transportation Commission, the Oklahoma Department of Transportation or any of its officers or employees for claims or losses resulting from pre-existing defects or dangerous conditions, whether known or unknown, from the effective date of the Act (October 1, 1985) to October 1, 1990.¹⁷³

4. *miscellaneous*

The Act contains several exemptions from liability which can not be easily grouped in one of the three general categories noted above. Claims covered by any worker's compensation or employer's liability acts,¹⁷⁴ claims which are limited or barred by law,¹⁷⁵ and claims arising from acts or omissions that conform "with then current recognized standards"¹⁷⁶ are all excluded. Claims arising from the act or omission of independent contractors or third parties not directly employed by the

168. *Id.*

169. *Id.* § 155(8) (exception is not available if the condition was caused by the affirmative negligence of the state or political subdivision).

170. *Id.* § 155(27) (exception is not available if the state failed to warn of unsafe conditions, or if the loss was the result of an affirmative negligent act).

171. *Id.* § 155(15) (exemption to liability includes the absence, condition, location, malfunction, removal or destruction of traffic signs or signals; however, there are some qualifications to this exemption).

172. *Id.*

173. *Id.* § 155.1. It appears the legislature wished to give these transportation agencies additional time to get their houses in order, before exposing them to increased liability.

174. *Id.* § 155(14). From the wording of this exception, it appears immaterial whether the claimant receives full or any compensation for his injury from these alternative sources.

175. *Id.* § 155(16) (exception not limited to Oklahoma law).

176. *Id.* § 155(26).

state or political subdivision¹⁷⁷ and claims based on product liability or breach of warranty¹⁷⁸ are also excluded. Further, claims resulting from the theft of money left in the custody of a government employee,¹⁷⁹ claims based on the theory of attractive nuisance¹⁸⁰ and claims involving unintentional misrepresentations¹⁸¹ are excluded. Finally, claims resulting from the natural condition of state or political subdivision unimproved property,¹⁸² and claims arising from interscholastic and other athletic contests¹⁸³ are excluded.

c. Procedural limitations

The Act contains procedural requirements, which if not complied with fully, could result in a complete bar to the plaintiff's action.¹⁸⁴ The claimant must first present his written request for relief to the state or political subdivision involved in the action.¹⁸⁵ This request for relief must be presented within ninety days of the date the loss occurred.¹⁸⁶ If the claim is presented after this ninety day period, but within one year from the date of loss, "any judgment in a lawsuit arising from the act which is the subject of the claim shall be reduced by ten percent (10%)."¹⁸⁷ If the claim is not presented within one year from the date of loss, the plaintiff's action is "forever barred."¹⁸⁸

Note that the statute of limitation period begins to run from the date the loss occurred, not from the date the loss was discovered. There are two exceptions to the one-year filing period for claims. First, where the claimant is unable to present his claim due to incapacity from the injury, he can obtain an extension of time not exceeding ninety days.¹⁸⁹ Second, a wrongful death claim can be presented by the personal representative of the injured party within one year from the date of the injury without a

177. *Id.* § 155(18) (independent contractor's employees, agents, suppliers and subcontractors are included in this exception).

178. *Id.* § 155(24) (exemption to liability applies whether the basis of the claim rests on either express or implied theories of product liability or breach of warranty).

179. *Id.* § 155(19) (exemption to liability does not include losses due to the negligent or wrongful act or omission of the government employee).

180. *Id.* § 155(7).

181. *Id.* § 155(17).

182. *Id.* § 155(10).

183. *Id.* § 155(20) (exemption to liability includes any athletic contest connected with the state or political subdivision through sponsorship or ownership of the site of the contest).

184. *See infra* notes 185-193 and accompanying text.

185. OKLA. STAT. tit. 51, § 156(A) (Supp. 1984).

186. *Id.* § 156(B).

187. *Id.*

188. *Id.*

189. *Id.* § 156(E).

reduction in judgment.¹⁹⁰

Before a claimant can commence a suit against the state or political subdivision, he must have previously submitted a claim and had that claim denied in whole or part.¹⁹¹ The claim is deemed denied if it is not approved in its entirety by the state or political subdivision within ninety days from submittal and no settlement has been reached between the parties.¹⁹² The claimant must commence his suit within one hundred eighty days after denial of the claim or his action is barred forever.¹⁹³

Thus, the new law places many procedural hurdles and trapdoors in the path of any plaintiff seeking to bring a claim against the state or political subdivision under this Act. If plaintiff's counsel does not stay current on the filing periods, it may result in either a reduction in recovery, or a complete bar to the action. Other procedural requirements of the Act are discussed below.

5. Additional Procedural Aspects of the Act

With respect to the statute of limitations periods discussed above, the Act specifies what information is to be included in the initial request for relief¹⁹⁴ as well as to whom the request must be submitted.¹⁹⁵ The Act authorizes the state or political subdivision, after consulting with legal counsel, to either settle or defend the claim.¹⁹⁶ If a settlement is reached, the governmental unit is further authorized by the Act to appropriate money for the payment of the settlement amount. However, if the payment exceeds ten thousand dollars and any part of it is not covered by insurance, court approval of the payment must be obtained.¹⁹⁷

With respect to insurance obtained by the state or political subdivision, no evidence may be presented at trial concerning the existence of

190. *Id.* § 156(F).

191. *Id.* § 157(A).

192. *Id.*

193. *Id.* § 157(B).

194. *Id.* § 156(E) (claim must state the date, time, place and circumstances of the claim; the amount of relief sought; and the names, addresses and telephone numbers of the claimant and any agent authorized to settle the claim).

195. *Id.* § 156(C) (claims against the state to be filed with Attorney General and agency head) and § 156(D) (claims against political subdivision to be filed with clerk of governing body).

196. *Id.* § 158(A).

197. *Id.* If there is an insurance policy covering the state or political subdivisions, the terms of the policy control the rights and obligations of the governmental unit and the insurance company, with respect to investigation, settlement, payment and defense of the claim. *Id.* § 158(B) (any settlement reached by the insurance company cannot exceed the policy amount without the governmental unit's approval).

any such insurance.¹⁹⁸ The state or political subdivision is not liable for any costs, judgments or settlements paid under its insurance policy,¹⁹⁹ and it has the right to use any such insurance payments as a setoff against its own liability from the same occurrence.²⁰⁰ Finally, the state or political subdivision has the right of subrogation against its insurance company, up to the limits of its policy amount.²⁰¹

Any action brought against the state or political subdivision must be filed in the name of the real party in interest²⁰² and in no case can a claimant file his claim or receive a recovery under a right of subrogation.²⁰³ Further, all actions brought under this Act must name the state or political subdivision as defendant²⁰⁴ and in no event can an employee of the government entity, acting within the scope of his employment, be named as defendant.²⁰⁵ Any judgment or settlement obtained under this Act constitutes a complete bar to any action brought by the claimant against the government employee whose conduct gave rise to the judgment or settlement.²⁰⁶ The state or political subdivision also has a right of recovery against its employee for any judgment, settlement or defense costs paid by the governmental unit, if the employee was acting outside the scope of his employment or if the employee failed to cooperate in good faith with the defense of the claim.²⁰⁷

The Act specifies that the Attorney General will defend all actions brought under this Act, where the state has the duty to defend,²⁰⁸ except where a state agency is authorized by law to use its own attorneys.²⁰⁹ In actions against the state, service is to be made by certified mail, return receipt requested, to the Attorney General with a copy to the head of the agency involved.²¹⁰ In actions against a political subdivision, service is to be made as required by law in civil cases.²¹¹

198. *Id.* § 163(G).

199. *Id.* § 158(D).

200. *Id.*

201. *Id.* § 158(E).

202. *Id.* § 163(D).

203. *Id.*

204. *Id.* § 163(C).

205. *Id.*

206. *Id.* § 160.

207. *Id.*

208. *Id.* § 161.1 (the Act is silent as to who has the duty to defend in actions brought against a political subdivision under this Act).

209. *Id.*

210. *Id.* § 163(E) (service must include the summons and a copy of the petition).

211. *Id.* § 163(F) (if no method of service is prescribed by law then service can be made on the administrative head of the political subdivision or as authorized by the court with jurisdiction over the action).

Venue for actions against the state is either in the county where the claim arose or in Oklahoma County,²¹² except that another county may be selected in lieu of Oklahoma County by a state agency, board or commission if it files a resolution with the Secretary of State.²¹³ Venue for actions brought against a political subdivision is in either the county where the claim arose or in the county where the political subdivision is located.²¹⁴

A claimant, who obtains a judgment against the state or political subdivision for which the government entity has insurance coverage, may use any method for obtaining payment as provided in the "policy or contract or law," up to the limits of the insurance coverage.²¹⁵ Judgments obtained against the state which are not covered by insurance may be paid by the state agency involved at its discretion and with the approval of the Director of State Finance, from its available funds.²¹⁶ The Act, however, allows the state agency to take up to four years to pay off judgments not covered by insurance, and no provision is made in the Act to require the agency to pay the claimant interest on that portion of the judgment withheld during the four year period.²¹⁷ Judgments obtained against a political subdivision, for which there is no insurance coverage available, may be paid at a rate of one-third ($\frac{1}{3}$) each year from an appropriate sinking fund or, with court approval, over a period of not less than one year nor greater than ten years.²¹⁸ If payment by the political subdivision exceeds three years, the Act provides for interest to be paid to the judgment holder.²¹⁹ Also, the Act states that "[n]othing in it shall be interpreted as allowing liens on public property."²²⁰

Finally, nothing within the Act itself either abrogates or amends any existing remedies, causes of action or claims presently held.²²¹ Nor does the Act apply to any claim against the state or political subdivision which arose before the effective dates of the Act.²²²

212. *Id.* § 163(A).

213. *Id.*

214. *Id.* § 163(B).

215. *Id.* § 159(B).

216. *Id.* § 159(D).

217. *Id.* ("... no agency shall be required to pay a judgment prior to the fiscal year next following the fiscal year in which the judgment is obtained. Any such judgment may be paid at a rate of one-third ($\frac{1}{3}$) per fiscal year from funds available for operation of the agency.")

218. *Id.* § 159(C).

219. *Id.* (interest rate as prescribed by law for first three years and six percent for each remaining year).

220. *Id.* § 159(E).

221. *Id.* § 171.

222. *Id.*

6. Impact of the Act

The impact the Act will have in the area of tort claims brought against the state or political subdivision will depend heavily on the Oklahoma courts' interpretation of the Act. As discussed above, the Act contains many limitations to liability.²²³ Because some of these limitations are vague and/or broad, the courts, through a very strict construction of the Act, could bar most types of claims brought against a governmental entity.²²⁴

The impact of the Act will be further restricted by the strict procedural requirements that must be complied with, especially the statute of limitation period which controls the filing of the action.²²⁵ The effect of the statute of limitation is compounded because the initial claim, which must be presented and denied before a suit can be commenced, may be denied through the inaction of the governmental entity it was presented to.²²⁶ This silent denial could result in a plaintiff being barred from bringing his action before he is even aware that the limitations period has begun to run.²²⁷

Even when a plaintiff manages to comply with all of the Act's procedural requirements and is not stopped by the court's interpretation of the Act's liability exemption language, any recovery will be subject to the ceilings placed on monetary recoveries by the Act.²²⁸ These ceilings will have the effect of continuing to put the risk of loss on the injured party, instead of on the party responsible for the wrong. Ceilings on recoveries will also have the effect of placing the risk of loss on individuals in the

223. Based on various exemptions to liability built into the Act, there appears to be very little substance left to what is commonly thought of as torts for which the state or its political subdivisions may be held liable for. A government entity stands a good chance of not being held liable for the intentional torts of its agents and employees, because the wrongful activity at issue very likely would be found to be outside the scope of employment by a court. *See supra* notes 120-122 and accompanying text. For non-feasance negligence cases, a court would probably hold that the government entity was acting within its discretionary powers and, therefore, would retain its immunity, unless there was a specific law directing the entity to act. *See supra* notes 153-162 and accompanying text. In negligence causes of action based on affirmative actions of the government entity, liability would be greatly limited by the numerous substantive and procedural limitations contained in the Act. *See supra* notes 144-193 and accompanying text.

224. Historically, the courts have strictly construed any waiver of sovereign immunity. *See supra* note 37 and accompanying text. Also, if the court interprets such vague exception language as "discretionary acts" or "then current recognized standards" very broadly, a plaintiff would have an extremely heavy burden to overcome in order to avoid a defense of sovereign immunity. *See supra* notes 153-162 & 176 and accompanying text.

225. *See supra* notes 184-193 and accompanying text.

226. *See supra* notes 191-193 and accompanying text.

227. *Id.* (action barred if suit not brought within one hundred eighty days from when initial claim "deemed" denied).

228. *See supra* notes 134-137 and accompanying text.

lower income brackets. Individuals in the upper income brackets are more likely to have the means of obtaining casualty insurance to protect themselves from the wrongs of the state. It is unlikely that such protection is a viable option for those in lower income brackets.

VI. CONCLUSION

The discussion above indicates that sovereign immunity will likely be the rule instead of the exception in Oklahoma, even after the Act goes into effect. Many of the injustices associated with sovereign immunity, which historically have been criticized by courts and legal scholars alike, will continue to plague those seeking recovery.

Because the new Act requires the extensive involvement of the courts, the only hope an injured party may have in obtaining compensation lies in the courts' interpretive discretion. A liberal construction of the Act would not only allow an injured party to receive some compensation, but it would also encourage the government entity or its agent to enter into reasonable settlement negotiations with the injured party. On the other hand a strict interpretation by the courts which favors sovereign immunity, would only encourage defense attorneys for the state or political subdivision to either avoid settlements altogether or force plaintiffs into accepting unreasonable settlements. In either case, the result would be to increase litigation and to burden individuals with the cost of wrongs committed by an entity whose function is to protect as well as to govern.

The early English kings waived their personal immunity to suit in their own courts on a regular basis. Before forwarding claimant's petition to the court, the king would note, "let justice be done."²²⁹ The Oklahoma courts should follow the king's example.

George J. Meyer

229. Jaffe, *supra* note 5, at 4.

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